No. 15-674

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, et al., Petitioners,
v.

STATE OF TEXAS, et al., Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF NATIONAL JUSTICE FOR OUR NEIGHBORS AND THE JUSTICE FOR OUR NEIGHBORS NETWORK IN SUPPORT OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICI CURIAE 1
INTRODUCTION AND SUMMARY OF ARGUMENT 3
ARGUMENT 6
I. DHS's Authority To Grant Deferred Action Is Inextricably Entwined With Its Prosecutorial Discretion Authority 6
II. Congress Gave DHS The Authority To Grant Employment Authorization To Deferred Action Recipients Long Before The Johnson Memorandum Was Issued 9
III. Congress Gave DHS The Authority To Pause The Accrual Of Unlawful Presence For Deferred Action Recipients Long Before The Johnson Memorandum Was Issued 14
A. *Unlawful* Presence Defined 16
B. Authorized Period Of Stay Defined 18
C. Lawful Status Defined 19
D. An Authorized Period Of Stay, Which Pauses The Accrual of Unlawful Presence, Is *Not* Lawful Status *Per Se* 20
E. The Court Below Erred By Equating Deferred Action With Lawful Status 23
CONCLUSION 26
APPENDIX: LIST OF AMICI CURIAE 1a

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
132 S. Ct. 2492, 2499 (2012).....7, 18
Arizona Dream Act Coal. v. Brewer,
757 F.3d 1053 (9th Cir. 2014) 12
Arpaio v. Obama,
797 F.3d 11 (D.C. Cir. 2015).....5
Chaudhry v. Holder,
705 F.3d 289 (7th Cir. 2013).....17, 20, 21-23
Chamber of Commerce of U.S. v. Whiting,
563 U.S. 582 (2011).....12
Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833, 846 (1986).....7
De Silva v. Smith,
773 F.2d 1021 (9th Cir. 1985).....24
Dhuka v. Holder,
716 F.3d 149 (5th Cir. 2013).....19, 21
Heckler v. Chaney,
470 U.S. 821 (1985).....8
Hoffman Plastic Compounds, Inc. v. N.L.R.B.,
535 U.S. 137 (2002).....12
Lennon v. INS,
527 F.2d 187 (2nd Cir. 1975).....4
Matter of Arrabally & Yerrabelly,
25 I&N Dec. 771 (BIA 2012) 17
Matter of L-K-,
23 I&N Dec. 677 (BIA 2004).....22

Perales v. Casillas,
903 F.3d 1043 (5th Cir. 1990).....12
Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999).....4, 7
Texas v. U.S.,
809 F.3d 134 (5th Cir. 2015).....10, 13-15, 23
Texas v. U.S.,
86 F. Supp. 3d 591 (S. Dist. Tex. 2015).....14
U.S. v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985).....6-7
Vergil v. INS,
536 F.2d 755 (8th Cir. 1976).....6

Statutes

Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
Pub. L. 104-208.....16, 24
Immigration and Nationality Act,
8 U.S.C. § 1101 *et seq*.....4
Immigration Reform and Control Act of 1986,
Pub. L. 99-603.....9-12
Pub. L. No. 107-56, §423(b), 115 Stat. 272, 361.....6
Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392....6
8 U.S.C. § 1101(a).....18
8 U.S.C. § 1103(a).....10, 18
8 U.S.C. § 1154(a)(1)(D)(i)(II).....6
8 U.S.C. § 1154(a)(1)(D)(i)(IV).....6
8 U.S.C. § 1182(a)(6)(A)(i).....22
8 U.S.C. § 1182(a)(9)(B).....16-19, 22-25

8 U.S.C. § 1227(a)(1)(C)(i).....19
8 U.S.C. § 1227(a)(1).....21
8 U.S.C. § 1227(d)(2).....6, 8
8 U.S.C. § 1324a.....9
8 U.S.C. § 1324a(a)(1).....10-13
8 U.S.C. § 1324a(b)(1)(C)(ii).....11
8 U.S.C. § 1324a(b)(2).....12
8 U.S.C. § 1324a(h)(3).....10-11, 13
8 U.S.C. § 1255(c).....10, 20
8 U.S.C. § 1611(b)(2) 17
26 U.S.C. § 32(c)(1)(A).....17
26 U.S.C. § 32(c)(1)(e).....17
26 U.S.C. § 32 (m).....17
28 U.S.C. § 2401(a) 14
42 U.S.C. § 405(c)(2)(B)(i)(I).....17
49 U.S.C. § 30301.....6, 17, 23

Regulations

8 C.F.R. § 1.3(a)(4)(vi).....16
8 C.F.R. § 109.1 .....7, 10
8 C.F.R. § 214.14(d)(3).....19
8 C.F.R. § 245.1(d).....20
8 C.F.R. § 274a.12.....13-14
8 C.F.R. § 274a.12(c)(14).....7-9, 10, 13
8 C.F.R. § 1100.35(b)(2).....18
20 C.F.R. § 416.1618(a) 24
28 C.F.R. § 1100.35(b)(2).....18
44 Fed. Reg. 43,480 9
46 Fed. Reg. 25079-03 7

52 Fed. Reg. 46,092-01.....10-11

Policy Memoranda

9 Foreign Affairs Manual 40.92(b)(7).....19
Donald Neufeld, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, May 6, 2009.....16-17, 22-24
Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).....6, 24-25
Jeh Johnson Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, November 20, 2014.....*passim*
Office of Programs, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act* June 17, 1997.....25
John Torres, *Detention and Deportation Officer's Field Manual*, Chapter 20.8, March 27, 2006.....24
Johnny N. Williams, *Unlawful Presence*, June 12, 2002.....19, 24, 25

Supreme Court Rules

Rule 37.3(a).....1

Rule 37.6.....2

Miscellaneous

Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1173 (June 2015).....11
Immigration Reform and Control Act of 1986, Hearing on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary, 99th Cong. 1 (1985).....11
Violence Against Women Act ("VAWA") of 2005: Hearing on S.1197 Before the S. Comm. on the Judiciary, 109th Cong. 1 (2005).....13
Shoba Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. Rev. 1, 49 (March 2012).....8

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INTEREST OF AMICI CURIAE

National Justice For Our Neighbors and the Justice For Our Neighbors Network ("JFON")[1] were

[1] The parties have consented to the filing of this brief, and their letters of consent are enclosed with the brief. Rule 37.3(a). No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the

established by the United Methodist Committee on Relief in 1999 to serve its longstanding commitment and ministry to immigrants in the United States. The goal of JFON is to provide hospitality and compassion to low-income immigrants through immigration legal services, education, and advocacy.

JFON operates a network of legal clinics based in United Methodist churches throughout the country. It employs a small staff at its headquarters in Springfield, Virginia, which supports fourteen JFON sites nationwide. Those fourteen sites collectively employ more than thirty immigration attorneys, operate in eleven states and Washington, D.C., and manage approximately forty clinics. JFON served low-income clients in more than 7,800 cases last year.

JFON therefore has well-developed expertise in the area of immigration law and a keen interest in the fair and equitable implementation of laws and policies touching upon immigrant rights. As a Christian ministry, JFON is firmly committed to seeking justice for immigrants and their families. Lev. 19:33-34 ("When immigrants reside among you in your land, do not mistreat them...; [they] must be treated as your native born...; [l]ove them as yourself, for you were [also] immigrants..."). Indeed, Methodists "believe the family to be the basic human community through which persons are nurtured and sustained in mutual love,

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preparation or submission of this brief, and no one other than *amici curiae* and their counsel made any such monetary contribution. Rule 37.6.

responsibility, respect, and fidelity." United Methodist Church, Social Principles & Creed: The Nurturing Community, available at http://www.umc.org/what-we-believe/the-nurturing-community (last visited March. 1, 2016).

Methodists also "affirm the importance of loving parents for all children" and "encourage social, economic, and religious efforts to maintain and strengthen relationships within families." *Id.* JFON therefore advocates for interpretations of federal immigration law and policy that preserve family unity, to the benefit of immigrant families, communities, and society at large.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government's authority to grant deferred action is inextricably entwined with its authority to exercise prosecutorial discretion in the enforcement of immigration law. Respondents have conceded that the government has the authority to set immigration enforcement priorities,[2] but they paradoxically assert prosecutorial discretion does not include deferred action.

Deferred action, or what used to be called "nonpriority status," is the term used to classify

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[2] Respondents' Brief in Opposition, December 29, 2015 ("Respondents' Brief") at 2, 20 ("The Executive does have enforcement discretion to forebear from removing aliens on an individual basis;" and it may establish "categories for removal prioritization" or it may "deprioritiz[e] removal for identified aliens.")

noncitizens who, though legally removable from the U.S., are not an enforcement priority to the federal government. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999); *Lennon v. INS*, 527 F.2d 187, 189, n. 3 (2nd Cir. 1975). In November 2014, Department of Homeland Security ("DHS") Secretary Jeh Johnson issued a memorandum providing guidance to United States Citizenship and Immigration Services ("USCIS") for case-by-case use of deferred action for certain noncitizens with significant ties to the U.S. who merit a positive exercise of discretion. *See generally*, Jeh Johnson Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, November 20, 2014 ("Johnson Memorandum"). It is the Johnson Memorandum that Respondents challenge.

There are approximately 11 million undocumented noncitizens within the U.S. Yet, Congress has given DHS resources to remove an estimated 400,000 a year, less than five percent of the total removable population. Thus, DHS must decide how to utilize its limited resources to enforce the Immigration and Nationality Act ("INA"). It could, for example, enforce the law against the first 400,000 removable noncitizens it encounters in a given year, it could do so randomly, or it could do so by setting and adhering to priorities that reflect those laid out in the INA. Through the Johnson Memorandum, DHS has chosen the latter option and sought to focus its limited resources where it feels they are needed most.

If forced to choose between removing noncitizens "most disruptive to ... public safety and national security," or noncitizen parents with established ties to the U.S., clean records, and U.S. citizen or resident children, the former is certainly a more faithful execution of the law than the latter. *See Arpaio v. Obama*, 797 F.3d 11, 24 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 900 (2016). By conceding that some noncitizens may be given low-enforcement priority, Respondents acknowledge the quintessence of deferred action.

Rather than take aim at deferred action as a subset of prosecutorial discretion, Respondents target the consequences that flow from a grant of deferred action. In particular, Respondents argue that (1) work authorization and (2) lawful presence are two features that set deferred action apart from prosecutorial discretion and thus violate the INA. However, their arguments, as directed at the Johnson Memorandum, are unavailing because neither work authorization nor pausing the accrual of unlawful presence stem from the 2014 Memorandum. Rather, both are founded upon well-established legal authority that predates the Johnson Memorandum.

In this brief, *amici* narrowly focus on DHS's longstanding legal authority to grant work authorization and pause the accrual of unlawful presence for recipients of deferred action.

ARGUMENT

I. DHS's Authority To Grant Deferred Action Is Well-Established and Inextricably Entwined With Prosecutorial Discretion.

The practice of granting deferred action as an exercise of prosecutorial discretion has existed for more than four decades. *See* Immigration and Naturalization Service ("INS"), Operation Instructions § 103.1(a)(1)(ii)(1975); *Vergil v. INS*, 536 F.2d 755, 758 (8th Cir. 1976) (noting that deferred action is a discretionary tool used for humanitarian reasons).

Likewise, it has been explicitly acknowledged by Congress. *See e.g.*, 8 U.S.C. § 1227(d)(2)("The denial of a request for administrative stay of removal under this subsection [relating to T and U visa applications] *shall not preclude the alien from applying for ... deferred action...*") (emphasis added); 8 U.S.C. §1154(a)(1)(D)(i)(II), (IV) (Self-petitioners under the Violence Against Women Act ("VAWA") are "eligible for deferred action and work authorization."); Pub. L. No. 107-56, §423(b), 115 Stat. 272, 361 (Certain family members of individuals killed on September 11, 2001, are "eligible for deferred action and work authorization"); Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-95 (Certain family members of U.S. citizens killed in combat are "eligible for deferred action ... and work authorization"); 49 U.S.C. § 30301 ("[V]alid documentary evidence that [a] person ... has approved deferred action status..." is sufficient to seek a state-issued driver's license); *U.S. v. Riverside*

Bayview Homes, Inc., 474 U.S. 121, 137 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.")[3]

Since at least 1981, deferred action, as a low-priority designation, has been referenced within federal regulations. *See* 46 Fed. Reg. 25079-03 (1981) ("Any alien in whose case the district director recommends ... *deferred action*, an act of administrative convenience to the government which gives some cases *lower priority*," may apply for work authorization) (emphasis added); 8 C.F.R. § 109.1 (1982); 8 C.F.R. § 274a.12(c)(14).

Additionally, this Court has acknowledged that deferred action falls within the purview of DHS's discretionary enforcement authority. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. at 484 (Explaining that immigration officials "may decline to institute proceedings..., or ... execute a final

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[3] Contrary to Respondents' claims, Congressional assignment of deferred action for specific categories of noncitizens cannot be construed as intent to eliminate the practice of issuing deferred action generally. *See e.g.*, 8 U.S.C. § 1227(d)(2)("The denial of a request for administrative stay of removal under this subsection *shall not preclude the alien from applying for ... deferred action...*") (emphasis added).

order of deportation.... [in an] exercise [of] ... *discretion*," and that "[a] case may be selected for *deferred action* treatment at any stage of the administrative process," approval of which "means that, for humanitarian reasons ..., no action will thereafter be taken") (emphasis added).

As such, it makes exceptionally little sense to assert that DHS has authority to set enforcement priorities, yet lacks the authority to make deferred action (i.e., low-priority) designations. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining that because "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing;" it must balance "a number of factors ... within its expertise," such as "whether [its] resources are best spent on this violation or another, ... whether the particular enforcement action ... best fits [its] overall policies, and ... whether [it] has enough resources to undertake the action"). The use of this prosecutorial discretion tool in a consistent, transparent, and reasoned manner based upon clear guidelines is a more "faithful execution" of the law than a random or haphazard application of deferred action. *Compare* Johnson Memorandum, *with* Shoba Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. Rev. 1, 49 (March 2012) (surveying the past inconsistent application of deferred action designations).

Congress has legislated with the knowledge and tacit approval of deferred action, and agencies have promulgated regulations (after notice and comment) interpreting Congressional acts that have some bearing on deferred action. 8 U.S.C. § 1227(d)(2); 8

C.F.R. § 274a.12(c)(14). Consequently, deferred action does not exist in a vacuum. Instead, it carries with it certain consequences that neither originated nor derived from the Johnson Memorandum.

Notwithstanding Respondents' claims, the Johnson Memorandum does not "*alter* INA requirements." *Cf.* Respondents' Brief at 20 (emphasis added). Rather, the practice of granting employment authorization and pausing the accrual of unlawful presence for recipients of deferred action is well-established in law that substantially predates the Johnson Memorandum.

II. Congress Gave DHS The Authority To Grant Employment Authorization To Deferred Action Recipients Long Before the Johnson Memorandum Was Issued.

Respondents argue that "[i]t is [the Johnson Memorandum] –and not prior statues or regulations– that ... makes [deferred action recipients] eligible for work authorization." Respondents' Brief at 22. However, they are mistaken.

In the Immigration Reform and Control Act ("IRCA") of 1986, Pub. L. 99-603, Congress affirmed the Executive's existing power to authorize noncitizens to be employed. 8 U.S.C. § 1324a. Even before IRCA, the Attorney General had exercised his broad authority over immigration by promulgating regulations enumerating categories of noncitizens authorized to work, a list which included deferred action recipients. *See* 44 Fed. Reg. 43,480 (July 25, 1979) (Rec-

ognizing that the Attorney General's authority to provide work authorization "stems from [8 U.S.C. § 1103(a)], which authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and administration of the Act" and 8 U.S.C. § 1255(c) (1977), which bars "from adjustment of status [certain] aliens ... who ... engage in *unauthorized employment*") (emphasis added); *see also* 8 C.F.R. § 109.1 (1981) (indicating that deferred action recipients are eligible to seek employment authorization).

After the passage of IRCA, revised regulations were issued reaffirming that deferred action recipients are eligible to obtain employment authorization. 8 C.F.R. § 274a.12(c)(14) (1988). That regulation remains valid today. *See Texas v. U.S.*, 809 F.3d 134, 183 (5th Cir. 2015) (dissent) ("Had Congress wanted to negate ... [8 C.F.R. § 274a.12], it presumably would have done so expressly;" that it did not do so signals its "implicit approval of this longstanding regulation").

IRCA begins by declaring that "[i]t is unlawful ... to hire... for employment in the United States ... an unauthorized alien (as defined in subsection (h)(3))." 8 U.S.C. § 1324a(a)(1)(A). Subsection (h)(3) then defines an "unauthorized alien" as one who is neither "lawfully admitted for permanent residence," nor otherwise "*authorized to be so employed by this chapter or the Attorney General.*" 8 U.S.C. § 1324a(h)(3) (emphasis added).

As such, Congress through IRCA took note of the Attorney General's existing authority to deter-

mine which noncitizens are entitled to work authorization and reaffirmed that authority. *See* 52 Fed. Reg. 46,092-01 (December 4, 1987). Indeed, INS reasoned that "the only logical way to interpret [the] phrase" authorized to be employed by "this chapter or the Attorney General" is that

> "Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority ..., defined 'unauthorized alien' ... as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute." *Id.*[4]

IRCA also entrusts the Attorney General, now the Secretary of Homeland Security, with "providing documentation ... of authorization ... to be employed in the United States" and delineating "any limitations

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[4] Immigration Reform and Control Act of 1986, Hearing on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary, 99th Cong. 1 (1985) (statement of Austin O. Fragomen) (Noting that the "Citizenship Section of the Immigration & Naturalization Service ... [has] substantial expertise in issuing ... employment authorization..."); *see also* Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1173 (June 2015) (Explaining that the "provision defining 'unauthorized alien' ... acknowledged the Attorney General's (and INS's) pre-existing practice of administratively deciding which categories of aliens could lawfully work").

with respect to the period or type of employment" permitted. 8 U.S.C. § 1324a(h)(1). Likewise, the law calls upon the Secretary of Homeland Security to define by regulation acceptable proof to establish one's authorization to be employed. 8 U.S.C. § 1324a(b)(1)(C)(ii) (stating that a document is valid evidence of employment authorization if "the [Secretary of Homeland Security] finds [it], by regulation, to be acceptable"). Finally, the statute provides the Secretary the authority to establish a form to verify a noncitizen's authorization to work. 8 U.S.C. § 1324a(b)(2) (providing that "[t]he individual must attest ... on the form designated ... that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, *or an alien who is authorized* under this chapter or *by the* [*Secretary*] to be hired, recruited, or referred *for ... employment*") (emphasis added). As such, the statute not only unambiguously gives DHS the authority to determine who is authorized to work, but it also gives DHS the ability to determine the length and type of employment authorization, as well as the documents to serve as proof thereof. *See id.*

Moreover, several courts have recognized that Congress through IRCA has given DHS broad authority over determining which noncitizens may work in the U.S. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 131 S.Ct. 1968, 1974 (2011) (explaining that "IRCA defines an 'unauthorized alien' as an alien who is ... not otherwise *authorized by the* [*Secretary*] *to be employed* in the United States") (emphasis added); *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 n. 3 (2002) (citing § 1324a(h)(3) for

the same proposition as *Whiting*); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) (recognizing "Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States"); *Perales v. Casillas*, 903 F.3d 1043, 1045-1047 (5th Cir. 1990) (holding that the decision to grant work authorization has been "committed to agency discretion by law").

Indeed, the majority opinion in *Texas v. U.S.* is the only court to *amici's* knowledge to question the validity of 8 C.F.R. § 274a.12. *See* 809 F.3d at 217 (dissent) ("[N]o court, until today, has ever cast doubt on this regulation"); *cf.* 809 F.3d at 183-85 (questioning whether Congress would grant such authority in a "[m]iscellaneous' definitional provision"). And it does so for exceptionally dubious reasons. Contrary to Respondents' assertion, specific direction by Congress to grant work authorization to particular noncitizens does *not* exclude all previous general authorization to issue employment authorization. *See e.g.*, Violence Against Women Act ("VAWA") of 2005: Hearing on S.1197 Before the S. Comm. on the Judiciary, 109th Cong. 1 (2005) (statement of Senator Kennedy) (noting that the provision granting work authorization to VAWA self-petitioners is intended to "*streamline a petitioner's ability to receive work authorization, without having to rely solely upon deferred action* as the mechanism through which ... [to] receive work authorization." (emphasis added)); *cf.* Respondents' Brief at 5-6.

Likewise, the court's interpretation of 8 U.S.C. § 1324a(h)(1) in *Texas v. U.S.*, renders superfluous the

language of the statute which provides that a noncitizen may be authorized to work "by this Act *or the Attorney General*." In effect, the court's reading of the statute reduces the language "*or the Attorney General*" to surplusage by requiring in every instance employment authorization to be tied to specific act of Congress. If left to stand, the lower court's holding casts a shadow over dozens of categories of noncitizens presently receiving employment authorization under 8 C.F.R. § 274a.12(a)-(c).[5] As such, it must be reversed.

III. Congress Gave DHS The Authority To Pause the Accrual Of Unlawful Presence For Deferred Action Recipients Long Before The Johnson Memorandum Was Issued.

The courts below, in conflating the distinct concepts of "lawful status" and "lawful presence," treat the Johnson Memorandum as though it conferred a form of "lawful status" upon deferred action recipients, an act deemed incongruous with prosecutorial

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[5] Additionally, even if *arguendo* the majority opinion in *Texas v. U.S.* were correct, and Congress did not intend to give DHS this general authority to issue employment authorization, Respondents cannot now challenge the thirty-five-year-old regulation, nor can they lay blame for it upon the 2014 Johnson Memorandum. Respondents may not like the way the Executive has exercised its authority in this area over the last thirty years, but they may not use a 2014 memorandum as a means to attack a longstanding regulation they would otherwise be time-barred from challenging. *See* 28 U.S.C. § 2401(a) (six-year statute of limitations period to challenge agency regulation).

discretion. *See Texas v. U.S.*, 809 F.3d at 167 ("Declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence..."); 86 F. Supp. 3d 591, 606 (S. Dist. Tex. 2015) (characterizing the Johnson Memorandum as "award[ing] legal presence status" through granting deferred action). Likewise, Respondents assert that "Congress has strictly limited the ability of aliens to acquire *lawful presence* on the basis of family reunification," erroneously converging the concept of lawful presence with lawful status. *See* Respondents' Brief at 3-4 (emphasis added) (describing "lawful *presence*" as limited to those granted "permanent resident ... 'immigrant' *status*..., 'nonimmigrant' *status*..., refugee *status*..., [and] temporary protected *status*") (emphasis added); *Id.* (reasoning that noncitizen parents can obtain "*lawful presence*" from a U.S. citizen child "*only* if they fulfill a number of demanding requirements, including voluntarily leaving the country and waiting for any reentry bar to expire") (emphasis added).

However, both Respondents and the courts below profoundly misunderstand the concepts of lawful presence and lawful status as those terms are used in immigration law. Indeed, they infuse the concept of lawful presence with a series of erroneous assumptions, making it tantamount to "lawful status." Substantively, this is simply incorrect. It is this fundamental misunderstanding of the meaning of the term "unlawful presence" that is at the root of the lower court's flawed holding. *See Texas*, 809 F.3d at 167, *cf. Chaudhry v. Holder*, 705 F.3d 289, 293 (7th Cir. 2013)

(noting the importance of being "mindful of the dangers of importing terms of art from one statute to another").

While recipients of deferred action are not "unlawfully present" because they are in a "period of stay authorized by the Secretary," they do not have "lawful status." That deferred action is considered a period of authorized stay is the result of Congressional action, not the Johnson Memorandum.

A. *Unlawful* Presence Defined

Congress defined lawful presence in the INA only in the inverse, stating that "an alien is deemed to be *unlawfully present* in the United States if ... present ... after the expiration of the *period of stay authorized by the* [*Secretary*] or is present ... without being admitted or paroled." *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (1997) (emphasis added). The statute also expanded the categories of noncitizens deemed to be *not* unlawfully present through five exceptions and a tolling provision. *See id.* at § 1182(a)(9)(B)(iii), (iv); Donald Neufeld, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, May 6, 2009 ("Neufeld Memorandum"). Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 ("IIRIRA"), there was no definition of unlawful presence; thus only presence after April 1, 1997, the effective date of

8 U.S.C. § 1182(a)(9)(B), may be deemed unlawful under that section. *See* Neufeld Memorandum at 2.

For purposes of immigration law, unlawful presence is a term of art relevant for the narrow purpose of determining how long an "unlawfully present" noncitizen must remain inadmissible before being eligible to seek a future immigrant or nonimmigrant visa.[6] *See* 8 U.S.C. § 1182(a)(9)(B)(i); *Chaudhry v. Holder*, 705 F.3d at 292. For example, noncitizens "unlawfully present in the United States for more than 180 days, but less than [one] year" are inadmissible for three years from the date of such noncitizens' departure or removal; those unlawfully present "for one year or more" are inadmissible for ten years. 8 U.S.C. § 1182(a)(9)(B)(i). It is also important to note that the unlawful presence bars are only triggered by certain departures from the U.S. *See Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) (holding that trips outside the U.S. under a grant of advanced parole are not departures that trigger the three or ten-year bars to inadmissibility).

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[6] While deferred action, by virtue of other laws and regulations, may carry with it additional legal effects, those outcomes are produced by Congress, not the Johnson Memorandum. *See e.g.*, 42 U.S.C. § 405(c)(2)(B)(i)(I); 8 U.S.C. § 1611(b)(2); 8 C.F.R. § 1.3(a)(4)(vi) (relating to social security); 49 U.S.C. § 30301 (relating to state-issued driver's licenses); 26 U.S.C. § 32(c)(1)(A), (c)(1)(e), (m) (relating to the Earned Income Tax Credit). The term "lawful presence" is not used coextensively in every federal or state statutory reference. In this brief, *amici* analyze unlawful presence and deferred action only through the lens of immigration law and policy.

B. Authorized Period of Stay Defined

As stated above, Congress has bestowed upon DHS significant authority and discretion to determine generally how best to enforce immigration law. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials."); 8 U.S.C. § 1101(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens..."); 8 U.S.C. § 1101(a)(3) ("He shall establish such regulations;... issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under" the statute).

Specifically, the statute at issue here gives the Secretary of Homeland Security the authority to authorize "*periods of stay*" to noncitizens, the effect of which is to suspend the "accrual of unlawful presence." *See* 8 U.S.C. §§ 1182(a)(9)(B)(ii). The Secretary has most recently exercised that Congressional grant of authority in a consolidated fifty-one page policy memorandum updated in 2009 by USCIS. *See generally*, Neufeld Memorandum. That memorandum provides guidance with respect to who is in a period of authorized stay, how to calculate the accrual of unlawful presence, when to apply the tolling provision, how the relevant inadmissibility bars are triggered, and when a waiver is available. *Id.*

In particular, the guidance reaffirms that deferred action is considered to be a "period of stay" authorized by the Secretary. *Id.* at 42; *see also* 28 C.F.R. § 1100.35(b)(2) ("Aliens granted *deferred action* based

upon [eligibility for a T visa] ... are considered to be present in the United States *pursuant to a period of stay authorized by* the [Secretary] for purposes of [§ 1182(a)(9)(B)]) (emphasis added); 8 C.F.R. § 214.14(d)(3) ("During the time" a U-visa petitioner is in "*deferred action ..., no accrual of unlawful presence* under [1182(a)(9)(B)] ... *will result.*") (emphasis added); Johnny N. Williams, *Unlawful Presence*, June 12, 2002 ("[A]n alien ... granted *deferred action*" is in a "period of stay authorized by the Attorney General" for purposes of § 1182(a)(9)(B).) (emphasis added); 9 Foreign Affairs Manual 40.92(b)(7) ("DHS has interpreted 'period of stay authorized by the Secretary of Homeland Security' as used in the construction of unlawful presence in [8 U.S.C. § 1182(a)(9)(B)] to include: ... deferred action").

C. Lawful Status Defined

In contrast to an "authorized period of stay," lawful status functions in an entirely different manner. Indeed, lawful status is relevant primarily to determine whether one admitted into the U.S. in a particular status is removable. *See e.g.*, 8 U.S.C. § 1227(a)(1)(C)(i) ("Any alien who was admitted as a nonimmigrant and who has *failed to maintain the* nonimmigrant *status* in which the alien was admitted ... or to comply with the conditions of any such *status*, is deportable") (emphasis added). If one is in valid lawful status and has not committed an act that renders him removable, he has a legal right to remain in the U.S. *See e.g., Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013) ("We conclude that 'lawful status' implies a right protected by law, while '[a period of stay]

authorized by the [Secretary]' describes an exercise of discretion by a public official.")

Whether a noncitizen is in lawful status can also affect his eligibility to seek permanent residence. *See* 8 U.S.C. § 1255(c) (Providing that certain noncitizens otherwise eligible for permanent residence are ineligible if they are "in *unlawful* immigration *status* on the date of filing the application" or have "failed ... to maintain continuously a *lawful status* since entry into the United States") (emphasis added). Federal regulations provide that for purposes of 8 U.S.C. § 1255(c) "the term 'lawful immigration status' will only describe the ... status of an individual who is ... in ... permanent resident status, ... nonimmigrant status, ... refugee status..., asylee status..., parole status..., or ... [e]ligible for the benefits of ... the Immigration Nursing Relief Act of 1989." 8 C.F.R. § 245.1(d).

While it follows that a noncitizen in lawful status is not accruing unlawful presence, the reverse is not necessarily true. *See* Neufeld Memorandum at 11, 33. Indeed, "[i]t is entirely possible for aliens to be lawfully present (i.e., in a 'period of stay authorized by the [Secretary]') even though their lawful status has expired." *Chaudhry*, 705 F.3d at 292.

D. An Authorized Period of Stay, Which Pauses the Accrual of Unlawful Presence, is *Not* Lawful Status *Per Se*.

Contrary to what the term might suggest, "lawful presence," or more accurately "a period of author-

ized stay that pauses the accrual of *unlawful* presence"[7] does *not* confer lawful status nor is it a defense to removal. The Neufeld Memorandum puts it this way:

> "As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully... to remain in the United States .... In that sense, the alien's remaining can be said to be '*authorized*.' However, the fact that the alien does not accrue unlawful presence does not mean that the alien's presence in the United States is actually lawful." *Id.* at 9 (emphasis added).

A good illustration of the interplay between unlawful *presence* and unlawful *status* relates to noncit-

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[7] The Johnson Memorandum states that deferred action recipients are "for a specified period of time ... permitted to be *lawfully present* in the United States." *See* Johnson Memorandum at 2 (emphasis added). *Amici* contend that for immigration purposes it would have been more accurate to state that recipients of deferred action are in an "authorized period of stay," or alternatively, they are not accruing *unlawful* presence. However, for practitioners, it has become commonplace to refer to those who are in a "period of authorized stay such that they have ceased accruing unlawful presence" simply as being "lawfully present." It is crucial, however, to not give this semantic variation—employed for the sake of efficiency—more substantive weight than it is due when considering the actual effect the "cessation of unlawful presence" has for recipients for deferred action.

izen minors who have entered the U.S. without permission. While such minors who have no lawful status are subject to a charge of removability, they are not accruing unlawful presence. *Compare* 8 U.S.C. §§ 1182(a)(6)(A)(i); 1227(a)(1) (Those present without admission or parole, or otherwise in violation of law are removable, irrespective of age); *with* 8 U.S.C. § 1182(a)(9)(B)(iii) ("No period of time in which an alien is *under 18 years of age* shall be taken into account in determining [his or her] period of *unlawful presence* in the United States.") (emphasis added).

Simply being in a state where one is not unlawfully present does not equate to lawful immigration status, nor does it confer immunity from removal. *See Dhuka v. Holder*, 716 F.3d at 159 (recognizing that "the definition of lawful status set out in the regulations forecloses the argument that a period of stay authorized by the Attorney General might also constitute lawful status") (internal quotations omitted) (citing *Chaudhry*, 705 F.3d at 292) ("[U]nlawful presence and unlawful status are distinct concepts")).

The Neufeld Memorandum recognizes this phenomenon created by the statute explaining that "there are some circumstances in which an alien *whose status is actually unlawful* is, nevertheless, protected from the accrual of unlawful presence." *See* Neufeld Memorandum at 11, 33 (emphasis added); *Matter of L-K-*, 23 I&N Dec. 677, 680-81 (BIA 2004).

Deferred action is just one of fourteen such examples given in the Neufeld Memorandum as a "period of authorized stay" that is *not* considered lawful status.[8] *Id.* at 33-43.

E. The Court Below Erred by Equating Deferred Action With Lawful Status.

As previously stated, the court below treated "lawful presence" in relation to deferred action recipients in such a manner as to suggest that deferred action was tantamount to "lawful status." *See Texas v. U.S.*, 809 F.3d at 167. Respondents likewise seek to blur that distinction as fodder for their attack on the Johnson Memorandum. *See* Respondents' Brief at 3-4.

However, immigration law and policy have long painted a very different picture. The Neufeld Memorandum states in no uncertain terms that deferred action—defined as an "administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority"—is not "an entitlement, and *does not make the alien's status lawful.*" *Id.* at 42 (emphasis added). Rather, deferred action

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[8] *Cf.* 49 U.S.C. § 30301 (Referencing "approved deferred action status..." as lawful status for the limited purpose of determining eligibility for a state-issued driver's license). This statute illustrates the importance of being "mindful of the dangers of importing terms of art from one statute to another." *See e.g., Chaudhry*, 705 F.3d at 293. Because 49 U.S.C. § 30301 relates only to eligibility driver's licenses, it cannot alter the analysis from an immigration standpoint.

merely temporarily suspends the "[a]ccrual of *unlawful presence* ... on the date an alien is granted deferred action and resumes the date after [it] is terminated;" it does "not eliminate any [previous] periods of unlawful presence." *Id.*; *see also* Johnny N. Williams Memorandum, *Unlawful Presence*, June 12, 2002 ("Williams Memorandum") (Determining that "[f]or purposes of ... [8 U.S.C. § 1182(a)(9)(B)], and for no other purpose or benefit under the Act, the INS has designated ... as periods of stay authorized by the Attorney General ... [c]urrent grants of deferred action in effect on or after April 1, 1997").[9]

Even before the 2009 Neufeld Memorandum, the former INS stated that the decision to treat "deferred action as a period of stay authorized by the [Secretary] does not in any way alter the nature of deferred action...." Williams Memorandum (citing Chapter 17.7 of the INS's Detention and Deportation Manual); *see also De Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985) (noting that the 1981 version of

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[9] The practice of treating deferred action recipients as being in "authorized period of stay" can be traced back to even before the enactment of IIRIRA. Indeed, deferred action grantees, before there was even a definition of unlawful presence, were described as "permanently residing under color of law," a phrase which referred to "aliens residing in the United States with the knowledge and permission of the Immigration and Naturalization Service," but who were not facing immediate enforcement of their departure. *See e.g.*, 20 C.F.R. 416.1618(a)(1988) (including within the categories of aliens deemed to be "permanently residing under color of law" those "granted deferred action status pursuant to [INS] Operations Instruction 103.1(a)(ii) prior to June 15, 1984 or 242.1(a)(22) issued June 15, 1984 and later").

INS Operations Instruction 103.1(a)(1)(ii) [relating to deferred action] does not "confer any benefit upon aliens, [but operates] merely for the INS's own convenience." (quotations omitted)); John Torres, Detention and Deportation Officer's Field Manual, Chapter 20.8, March 27, 2006 (stating that "[d]eferred action does not confer any immigration status upon an alien... [nor does it] cure any defect in status under any section of the Act for any purposes.")

Deferred action, while deemed to be a period of authorized stay, is not and has never been construed as lawful immigration status. That recipients of deferred action are deemed to not accrue unlawful presence for purposes of the three and ten-year bars of 8 U.S.C. § 1182(a)(9)(B) does not change that analysis. Deferred action recipients remain without status even though they are not "unlawfully present."

Moreover, the Johnson Memorandum is not the source of this phenomenon. Rather, it was Congress that created the unlawful presence inadmissibility bar and it was Congress that entrusted its enforcement and application to DHS. For nearly as long as a definition of "unlawful presence" has existed, the Executive has interpreted that definition to exclude individuals in a deferred action designation.[10]

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[10] *See* Williams Memorandum; *cf.* Office of Programs, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act* June 17, 1997 (Listing in interim guidance seven categories of noncitizens, including deferred action recipients, which were not considered to be in an authorized period of stay). The 1997 guidance was nullified by the 2002 Williams Memoranda.

That the court below equated deferred action with lawful status is a clear error of law and longstanding USCIS and INS policy. In the final analysis, pausing the accrual of unlawful presence for deferred action recipients is something very different from a grant of lawful status and Congress has given DHS the legal authority to make such determinations.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

LIST OF AMICI CURIAE

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Justice for Our Neighbors- Dallas

Justice for Our Neighbors- DC/Maryland

Justice for Our Neighbors- Houston

Justice For Our Neighbors- Iowa

Justice for Our Neighbors- Nebraska

Justice for Our Neighbors- New England

Justice for Our Neighbors- New York

Justice for Our Neighbors- Northern Illinois

Justice for Our Neighbors- San Antonio

Justice for Our Neighbors- Southeastern Michigan

Justice for Our Neighbors- South Florida

Justice for Our Neighbors- Tennessee

Justice for Our Neighbors- West Michigan